RECORD
AND
BRIEFS

Nos. 15-1359, 15-1358, 15-1363

IN THE

Supreme Court of the United States

JOHN D. ASHCROFT, former U.S. Attorney General, and ROBERT MUELLER, former Director of the FBI,
Petitioners,

v.

IBRAHIM TURKMEN, *et al.*,
Respondents.

(Caption continued on inside cover)

On Petitions for Writs of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF FORMER U.S. ATTORNEYS GENERAL WILLIAM P. BARR, ALBERTO R. GONZALES, EDWIN MEESE III, MICHAEL B. MUKASEY, AND DICK THORNBURGH; FORMER FBI DIRECTORS WILLIAM S. SESSIONS AND WILLIAM H. WEBSTER; AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Date: June 8, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

No. 15-1358

JAMES W. ZIGLAR,

Petitioner,

v.

IBRAHIM TURKMEN, *et al.*,

Respondents.

No. 15-1363

DENNIS HASTY and JAMES SHERMAN,

Petitioners,

v.

IBRAHIM TURKMEN, *et al.*,

Respondents.

QUESTIONS PRESENTED

1. Whether the judicially inferred damages remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to the novel context of this case, which seeks to hold the former Attorney General, former Director of the Federal Bureau of Investigation (FBI), and other senior federal government officials personally liable for policy decisions made about national security and immigration in the aftermath of the September 11, 2001 terrorist attacks.

2. Whether those senior officials are entitled to qualified immunity for their alleged role in the treatment of Respondents, because it was not clearly established that aliens legitimately arrested during the September 11 investigation could not be held in restrictive conditions until the FBI confirmed that they had no connections with terrorism.

3. Whether Respondents' allegations that those senior officials personally condoned the implementation of facially constitutional policies because of an invidious animus against Arabs and Muslims are plausible, as required by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), in light of the obvious alternative explanations—that the actions of the senior Justice Department officials were motivated by a concern that, absent fuller investigation, the government would unwittingly permit a dangerous individual to leave the United States, and that the actions of the heads of the Metropolitan Detention Center were motivated by a desire to comply with the FBI's terrorism designations.

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INTERESTS OF *AMICI CURIAE*

The *amici curiae* are five former Attorneys General, two former Directors of the FBI, and a public-interest law firm.[1] *Amici* believe that the qualified immunity doctrine provides important legal protections to federal government officials; it allows officials to perform their duties without the distraction of having to defend damages claims filed against them in their personal capacity. *Amici* are concerned that the decision below restricts that doctrine to such an extent that government officials will be unable to win pre-discovery dismissal of insubstantial constitutional claims. *Amici* are also concerned that the decision below inappropriately expands judicially inferred damages remedies against federal officials for alleged violations of constitutional rights, and it adopts a standard for what constitutes a "plausible" claim for relief that is far broader than the one established by this Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

The Honorable Alberto R. Gonzales served as Attorney General of the United States from 2005 to 2007. He also served as White House Counsel to President George W. Bush from 2001 to 2005 and as a Justice on the Texas Supreme Court from 1999 to 2001.

The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He also served as Counselor to President Ronald Reagan from 1981 to 1985.

The Honorable Michael B. Mukasey served as Attorney General of the United States from 2007 to 2009. From 1988 to 2006, he served as a judge on the U.S. District Court for the Southern District of New York, serving as Chief Judge from 2000 to 2006.

The Honorable William S. Sessions served as Director of the FBI from 1987 to 1993. He also served as a judge on the U.S. District Court for the Western District of Texas from 1974 to 1987, serving as Chief Judge from 1980 to 1987; and was the United States Attorney for the Western District of Texas from 1971 to 1974.

The Honorable Dick Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor of Pennsylvania from 1979 to 1987.

The Honorable William H. Webster served as Director of the FBI from 1978 to 1987. He also served as Director of the CIA from 1987 to 1991. He served as a judge on the U.S. District Court for the Eastern

District of Missouri from 1970 to 1973, and on the U. S. Court of Appeals for the Eighth Circuit from 1973 to 1978.

Washington Legal Foundation (WLF) is a non-profit public-interest law firm and policy center. It regularly appears in this and other federal courts to support appropriate enforcement of pleading standards in civil litigation.

STATEMENT OF THE CASE

Petitioners in Nos. 15-1358 and 15-1359 are high-ranking federal officials who played a prominent role in directing the Government's investigation into the events of September 11, 2001, when al Qaeda's murderous and unprovoked attack on American civilians resulted in nearly 3,000 deaths. Respondents are six aliens who were arrested for immigration violations and were detained in connection with that investigation, under highly restrictive conditions at the Metropolitan Detention Center (MDC) in Brooklyn.[2] They contend that the conditions of their detention violated their Fifth Amendment rights to substantive due process and equal protection of the laws.

Respondents allege that U.S. Attorney General

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[2] In using the term "Respondents," *amici* refer only to those six men. Two other plaintiffs/respondents—Ibrahim Turkmen and Akhil Sachdeva—were not detained at the MDC. The Second Circuit dismissed their claims, and they have not petitioned the Court for review of that dismissal. Petitioners in No. 15-1363 are the former Warden and Associate Warden at the MDC.

John Ashcroft and FBI Director Robert Mueller (Petitioners in No. 15-1359) actively supervised the 9/11 investigation. They allege that Ashcroft and Mueller developed a policy whereby the federal government would arrest any Arab or Muslim man who, while being questioned in connection with the investigation, was determined to be in the country in violation of immigration laws. Pet. App. 245a. They further allege that Petitioners established a "hold-until-cleared" policy, whereby aliens being detained because they were deemed "of interest" or "of high interest" to the investigation were not to be released until the FBI affirmatively cleared them of terrorist ties. *Id.* at 245a-246a. Ultimately, the Immigration and Naturalization Service (INS) placed 762 detainees on its Custody List (the "INS List"); those individuals were thereby made subject to the hold-until-cleared policy. *Id.* at 9a.

Bureau of Prisons (BOP) policy required that those classified as "of interest" or "of high interest" were to be confined "in the most restrictive and secure conditions permitted by BOP policy." *Id.* at 49a. At the MDC, that meant detention in the facility's Administrative Maximum Special Housing Unit ("ADMAX SHU"), a unit in which the conditions of confinement were quite harsh. Respondents do not contend however, that the confinement policies adopted for the ADMAX SHU violated either BOP policy or the U.S. Constitution. Respondents each were confined in ADMAX SHU for several months before being cleared of involvement in terrorism and deported. Respondents were among 84 individuals housed in ADMAX SHU during 2001-02. The great majority of individuals detained due to their "of interest" or "of

high interest" status were detained at non-federal facilities (such as the Passaic County Jail), where their conditions of confinement were far less harsh.

The Fourth Amended Complaint alleges that Petitioners violated Respondents' substantive due process rights by subjecting them to punitive conditions of confinement that allegedly served no valid governmental purpose. Although acknowledging that those conditions might have served a valid purpose if Petitioners had had reason to believe that the detainees were terrorists, Respondents allege that all Petitioners were aware that, for many of the aliens designated "of interest" or "of high interest," the government lacked any evidence plausibly connecting them to terrorism. Petitioners are alleged to have violated Respondents' equal protection rights by singling them out for harsh treatment based on their race, religion, and/or ethnic or national origin. *Id.* at 335a.

The district court granted motions to dismiss filed by Ashcroft, Mueller, and INS Commissioner James Ziglar, the Petitioner in No. 15-1358 (the "DOJ Petitioners"). The court concluded that the complaint did not plausibly allege punitive intent, Pet. App. 189a, nor did it plausibly allege that they "directed the detention of the plaintiffs in harsh conditions of confinement due to their race, religion, or national origin." *Id.* at 200a. The court largely denied motions to dismiss filed by the MDC-based defendants. *Id.* at 190a-194a, 200a-202a, 219a-220a; 224a-225a. They filed an interlocutory appeal from the denial of their assertion of qualified immunity. Respondents appealed dismissal of claims against the DOJ Petitioners.

A divided Second Circuit reinstated the substantive due process and equal protection claims against the DOJ Petitioners and largely affirmed denial of the MDC Petitioners' motion to dismiss. Pet. App. 1a-156a. The appeals court initially concluded that a *Bivens* remedy was available for each of Respondents' Fifth Amendment claims. *Id.* at 21a-29a. It held that Respondents' status as unauthorized aliens and the national security context of their detention was irrelevant to the *Bivens* analysis.

The appeals court also rejected Petitioners' assertion of qualified immunity. *Id.* at 46a-47a, 55a-57a, 71a-72a, 80a-81a. The court concluded that federal case law as of 2001 clearly established that Petitioners' alleged conduct violated Respondents' constitutional rights.

The appeals court also concluded that the complaint adequately stated claims against all Petitioners. The Court recognized that the DOJ Petitioners did not create the allegedly punitive confinement conditions in question. *Id.* at 30a. It nonetheless held that they could be charged with responsibility for those conditions, because the complaint alleged that: (1) they were aware that the New York office of the FBI had designated many Arab/Muslim detainees as "of interest" or "of high interest" despite lacking any credible evidence of their ties to terrorism; and (2) they approved merging the New York FBI's list of detainees (the "New York List") with the INS List, thereby ensuring application of the hold-until-cleared policy to Arab/Muslim detainees whom they knew could not plausibly be tied to terrorism. Pet. App. 30a-46a, 59a-65a.

The MDC Petitioners similarly asserted that the complaint failed to state a claim against them for constitutional violations, arguing that the most plausible inference to be drawn from the complaint's allegations is that they placed the six Respondents in the ADMAX SHU not for punitive or discriminatory purposes (as alleged by Respondents) but because BOP policy required them to do so. The Second Circuit rejected that assertion, noting that the complaint alleged that the MDC Petitioners eventually learned that the FBI was designating Arab/Muslim men as "of interest" and "of high interest" without any evidence of ties to terrorism. *Id.* at 48a-52a. The court concluded that the complaint adequately alleged claims against the MDC Petitioners by alleging that they continued to abide by the FBI's detainee classifications even after learning that those classifications lacked evidentiary support. *Ibid.*

Judge Raggi dissented. Pet. App. 83a-156a. She asserted that the courts should not recognize the claimed *Bivens* remedies against federal officials, when the claimed remedies challenge official "national security policy pertaining to the detention of illegal aliens in the aftermath of terrorist attacks by aliens operating within this country." *Id.* at 84a. Under those circumstances, she concluded, "Congress, not the judiciary, is the appropriate branch to decide whether the detained aliens should be allowed to sue executive policymakers in their individual capacities for money damages." *Ibid.*

She also concluded that Petitioners were entitled to qualified immunity. *Id.* at 84a-85a. She explained:

> The law did not [in 2001-02] clearly alert federal authorities responding to these challenges that they could not hold lawfully arrested illegal aliens—identified in the course of the 9/11 investigation and among the group targeted by al Qaeda—in restrictive (as opposed to general) confinement pending FBI-CIA clearance of any ties to terrorism unless there was prior individualized suspicion of a terrorist connection. Indeed, I am not sure that conclusion is clearly established even today.

Id. at 85a.

Judge Raggi also concluded that the complaint failed to adequately allege discriminatory treatment, stating that the complaint failed to allege facts from which one could reasonably infer that Petitioners acted "because of, not merely in spite of, the action's adverse effects" on Arabs/Muslims. *Id.* at 130a (quoting *Iqbal*, 556 U.S. at 681); *see also id.* at 142a-144a. She asserted, for example, that the complaint provides no factual basis for inferring that anyone decided to merge the New York List with the INS List "*because* it would keep [Respondents] in restrictive confinement." *Ibid.* Nor could the actions of the MDC Petitioners "plausibly imply discriminatory intent because they are obviously and most likely explained by reliance on the FBI's designations of each [Respondent] as a person 'of high interest,' or 'of interest,' to the ongoing terrorist investigation." *Id.* at 151a.

An equally divided Second Circuit denied rehearing *en banc*. Pet. App. 227a-240a. Judge Jacobs issued an opinion dissenting from the denial, joined by Judges Cabranes, Raggi, Hall, Livingston, and Droney. *Id.* at 231a-240a.

SUMMARY OF ARGUMENT

The petitions raise issues of exceptional importance. *Amici* urge the Court to grant review of all three Questions Presented. We write separately to focus particular emphasis on the qualified immunity question. Qualified immunity not only provides government officials with a defense to liability; it also is "an entitlement not to stand trial or face *the other burdens of litigation*." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added). The Court has made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' [will] be resolved prior to discovery." *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987). Yet, the decision below calls into question the ability of high-level Executive Branch officials to win dismissal, on qualified immunity grounds, of even frivolous *Bivens* litigation filed by anyone claiming to be aggrieved by their official conduct.

In the absence of dismissal, those officials face the prospect of discovery proceedings that are highly likely to distract them from their other responsibilities. As former senior Executive Branch officials, the individual *amici curiae* are concerned by the disruptive effects of such discovery, and they are very concerned that such disruptions are likely to impair the ability of high-level officials to carry out their missions

effectively. Review is warranted to determine whether such disruptions are required under the terms of the qualified immunity doctrine and the pleading standards established by the Federal Rules of Civil Procedure, particularly when (as here) the challenged actions involve sensitive national security issues.

Respondents raise constitutional claims that are largely the same as those at issue in *Iqbal* and that arise from precisely the same underlying facts: the detention of Arab/Muslim unauthorized aliens at the MDC under harsh conditions in 2001-02. *Iqbal* determined that the complaint at issue there did not adequately state a constitutional claim against Ashcroft and Mueller for their alleged role in the detentions. The Second Circuit decision, by reaching the opposite conclusion in connection with a complaint that added little in the way of new factual allegations, is in considerable tension with *Iqbal*. The same considerations that led the Court to review (and ultimately overturn) the Second Circuit's assessment of the adequacy of the pleadings in *Iqbal* should persuade the Court to grant review here as well. In particular, Respondents' complaint includes no factual allegations from which one can reasonably infer that Ashcroft, Mueller, and Ziglar played any role in determining the conditions of Respondents' confinement.

Review is also warranted to determine whether the courts should recognize a judicially inferred damages remedy against senior Executive Branch officials for alleged infringement of Respondents' constitutional rights in the course of carrying out their national security responsibilities. As Petitioners note,

the appeals courts are sharply divided on the issue, with the Fourth, Seventh, Ninth, and D.C. Circuits issuing decisions that conflict with the decision below. Review is warranted to resolve that conflict.

Amici also write separately to note that the Second Circuit's unprecedented recognition of *Bivens* actions to challenge Executive Branch national security policy conflicts with decisions of this Court. The Court has cautioned against recognition of new *Bivens* remedies when, as here, "special factors" counsel hesitation. Those special factors include the national security and immigration-law aspects of this case (areas in which courts traditionally defer to the judgments of the elected branches), the availability of alternative remedies (*e.g.*, *habeas corpus* proceedings), and the failure of Congress to provide an express damages remedy despite its considerable focus on detention-related issues arising in the course of the 9/11 investigation.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW THREATENS THE ABILITY OF FEDERAL OFFICIALS TO AVOID THE BURDENS OF LITIGATION IMPOSED BY INSUBSTANTIAL CLAIMS

The Court has long recognized that significant burdens are imposed on government officials when they are required to defend damages claims filed against them in their individual capacities for actions taken in connection with their employment. As the Court explained in *Harlow*:

> Each such suit [against high-level government officials] almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover[y] is wide-ranging, time-consuming, and not without considerable cost to the officials involved.

Harlow v. Fitzgerald, 457 U.S. 800, 817 n.29 (quoting *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring)).

The burdens can be particularly pronounced among officials working on national security matters, where the high level of public passion can result in increased levels of litigation. As Justice Stevens explained:

> The passions aroused by matters of national security and foreign policy and the high profile of Cabinet officers with functions in that area make them "easily identifiable [targets] for suits for civil damages." *Nixon v. Fitzgerald*, 457 U.S. [731,] 753 [(1982)]. Persons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and politically motivated litigation associated

> with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office. The multitude of lawsuits filed against high officials in recent years only confirms the rationality of this anxiety.

Mitchell, 472 U.S. at 541-42 (Stevens, J., concurring in the judgment).

Events proved Justice Stevens's prescience. Lawsuits seeking damages from senior Executive Branch officials for actions they took regarding national security matters proliferated throughout the administrations of Presidents Barack Obama, George W. Bush, and Bill Clinton. *See, e.g.*, *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012) (suit against Defense Secretaries Leon Panetta and Donald Rumsfeld alleging mistreatment of military detainee); *Ashcroft v. Al-Kidd*, 563 U.S. 731 (2011) (suit against Attorney General alleging improper authorization of material-witness warrants to detain terrorism suspects); *Gonzalez v. Reno*, 325 F.2d 1228 (11th Cir. 2003) (suit against Attorney General arising from execution of an arrest warrant for six-year-old Elian Gonzalez).

A. The Qualified Immunity Doctrine Was Crafted to Reduce the Burden on Government Officials of Defending Against Damages Claims

In an effort to reduce the burdens imposed by such suits, the Court has crafted a qualified immunity

doctrine designed to provide government officials with not only a defense to liability but also an "immunity from suit." *Mitchell*, 472 U.S. at 526. The "driving force" behind creation of the doctrine was a desire to ensure that "insubstantial claims [will] be resolved prior to discovery." *Anderson*, 483 U.S. at 640 n.2. *See also Saucier v. Katz*, 533 U.S. 194, 200 (2001) ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.").

Qualified immunity shields a government official from liability in an individual capacity so long as the official has not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. To overcome the defense of qualified immunity the plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a statutory or constitutional right; and (2) the right was clearly established at the time of the deprivation. *Saucier*, 533 U.S. at 199. Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). *Amici* submit that review of the second prong—whether the asserted right was "clearly established"—is particularly warranted in this case.

B. Under the Second Circuit's Ruling, Virtually Every Alleged Violation Will Be Deemed "Clearly Established"

The Second Circuit pointed to no pre-2001 decision whose holding directly supported its conclusion: that substantive due process prohibited federal officials from confining lawfully arrested unauthorized aliens in harsh conditions while investigating their possible involvement in terrorism.[3] Instead, it merely cited *Bell v. Wolfish*, 441 U.S. 520 (1979), for the more general proposition that "a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees." Pet. App. 47a. But that assertion begs the question: can the imposition of restrictive conditions of confinement on unauthorized aliens serve a "legitimate governmental objective?" In 2001-02, federal officials concluded that imposing harsh conditions could serve such objectives, by assisting in the federal government's response to a national-security crisis. In the absence of pre-2001 case law holding otherwise, Petitioners are entitled to good-faith immunity from damages claims challenging that conclusion.

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[3] The Second Circuit did not contest that the harsh conditions adopted at the MDC could, in appropriate circumstances, be imposed on convicted felons. Nor did it contest that federal immigration officials were entitled to detain Respondents and other unauthorized aliens under generally authorized prison conditions.

The Second Circuit's contrary conclusion sharply conflicts with this Court's qualified immunity case law. The Court has repeatedly explained that "[a] clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. ... Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Mullenix v. Luna*, 136 S. Ct. 305 (2015). Perhaps the best evidence that the substantive due process right asserted by Respondents was not "clearly established" is the Second Circuit's 6-6 vote denying rehearing *en banc* in this case. That half the judges on the Second Circuit concluded that Petitioners' alleged conduct did not violate the Due Process Clause is convincing evidence that the contrary view was not "clearly established."

The Second Circuit erred by examining the due process issue at too high a level of generality. This Court has "repeatedly told courts ... not to define clearly established law at a high level of generality. ... The general proposition, for example, that an unreasonable search and seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Al-Kidd*, 563 U.S. at 742. Similarly, the general proposition that the Due Process Clause prohibits the imposition of punishment on pre-trial detainees that serves no legitimate government objective is of little help in determining whether it was "clearly established" that the harsh conditions of confinement at issue here served no legitimate objective.

As the D.C. Circuit has pointed out:

> It does no good to allege that police officers violated the right to free speech, and then conclude that the right to free speech has been "clearly established" in this country since 1791. Instead, courts must define the right to a degree that would allow officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."

Int'l Action Ctr. v. United States, 365 F.3d 20, 25 (D.C. Cir. 2004) (Roberts, J.) (quoting *Anderson*, 483 U.S. at 639). Review is warranted to determine whether federal officials in 2001, based on then-existing case law, could reasonably have anticipated that their decision to impose harsh conditions of confinement on unauthorized aliens (as a means of securing information about terrorist activity) would give rise to liability for damages.

Review is also warranted to resolve the conflict between the decision below and the Fourth Circuit's grant of qualified immunity in a case arising in a similar national-security context. The Fourth Circuit held that qualified immunity barred a military detainee's damages claim against senior defense officials based on allegations that the conditions of his confinement unlawfully interfered with the free exercise of his religion (Islam). *Lebron*, 670 F.3d at 560. The Fourth Circuit held that the context in which a claim arises is crucial in determining whether the right to relief is "clearly established"—and thus whether the defendants are entitled to qualified

immunity. It held that free-exercise rights of the sort claimed by the plaintiff are not clearly established when they arise within a national-security context, even though those same rights are clearly established in a civilian context. *Ibid.* In sharp contrast, the Second Circuit based its "clearly established" determination on case law (*Bell v. Wolfish*) arising outside the context of immigration and national security, concluding that the immigration/national security context within which this case arose did not alter the qualified-immunity analysis.

II. THE DECISION BELOW CONFLICTS WITH THE PLEADING STANDARDS ARTICULATED BY *IQBAL* AND WITH OTHER CIRCUITS' UNDERSTANDINGS OF *IQBAL*

Fed.R.Civ.P. 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." While that rule eliminated earlier requirements that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (emphasis added), the rule:

> [S]till requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 n.3 (2007).

Twombly held that Rule 8(a)(2) requires a complaint to include sufficient "factual matter" to provide "plausible grounds" to infer that the allegations of the complaint are true. *Id.* at 556. It held that requiring plausibility "reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 557. The Court explained that a test requiring plausibility is not so strict as to require "probability" but nonetheless requires more than that the allegations are merely possible or conceivable. *Id.* at 557, 570.

Iqbal applied the Rule 8 pleading standards to claims substantially identical to those raised by Respondents. The plaintiff in *Iqbal* (a citizen of Pakistan arrested following 9/11 for violating immigration laws) sued Ashcroft, Mueller, and other federal officials for the harsh conditions he endured while incarcerated in ADMAX SHU. Reversing the Second Circuit, this Court determined that Iqbal had inadequately pleaded that Ashcroft and Mueller violated his Fifth Amendment rights to substantive due process and equal protection. *Iqbal*, 556 U.S. at 682-83. The Court concluded that although Iqbal claimed that they adopted a policy of detaining individuals in ADMAX SHU "because of their race, religion, or national origin," his *factual* allegations were insufficient to state a plausible discrimination claim. *Ibid.* The Court rejected his assertion that one could infer intentional discrimination from DOJ's hold-until-cleared policy, stating, "All it plausibly suggests is that

the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683.

Review is warranted to resolve the considerable tension between *Iqbal* and the decision below. The same considerations that led the Court to review (and ultimately overturn) the Second Circuit's assessment of the adequacy of the pleadings in *Iqbal* should persuade the Court to grant review here as well.

In concluding that Respondents satisfied the Rule 8 pleading standard, the Second Circuit focused primarily on a single factual allegation on which *Iqbal* had not focused: the decision of DOJ officials to merge the New York List with the INS List. The appeals court concluded that the merger decision ensured prolonged detention for those on the New York List because they would thereafter be subjected to DOJ's hold-until-cleared policy. Pet. App. 37a-42a, 59a-62a. It concluded that one could plausibly infer discriminatory intent (as well as an intent to punish without any legitimate governmental objective) from the DOJ Petitioners' approval of the merger because they were aware that: (1) the FBI's New York office had placed many individuals on the New York List despite lacking evidence connecting them to terrorism; and (2) the merger could result in those individuals' being subjected to harsh conditions of confinement for a prolonged period. *Ibid.*

The merging of the two lists will not bear the weight the Second Circuit assigns to it, even putting

aside the substantial evidence (catalogued by Judge Raggi in her dissent) that Ashcroft, Mueller, and Ziglar played no role in the merger decision. Even if one assumes that they were aware that some Arab/Muslim men would suffer prolonged detention in ADMAX SHU as a result of merging the lists, the Court has repeatedly cautioned that intentionally invidious discrimination is not demonstrated by showing that a defendant is aware that members of a specific religious or ethnic group will be adversely affected by a challenged decision. As the Court explained in concluding that Iqbal had inadequately alleged intentional discrimination by Ashcroft and Mueller on the basis of race, religion, or national origin:

> Under extant precedent purposeful discrimination requires more than intent as volition or intent as awareness of consequences. It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, [the action's] adverse effect on an identifiable group. It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Iqbal, 556 U.S. at 676-77 (citations omitted).

By far the most plausible inference one can draw from the decision to merge the lists is that federal officials sought to ensure a thorough review of all potential suspects, thereby minimizing the possibility that terrorists could slip through the cracks. Petitioners may have been aware, of course, that their decision would result in some Arab/Muslim unauthorized aliens enduring prolonged detention. But while Respondents allege that Petitioners knew that some of those on the New York List were not plausible suspects, there is no allegation that they had any short-term means of distinguishing such individuals from others who really were associated with terrorist activity. The only means of doing so without risking the release of dangerous individuals was to mandate a thorough review of all those on the New York List—a review that was facilitated by merging the two lists. Because this better-safe-than-sorry rationale is a far more plausible explanation of Petitioners' conduct than is the Second Circuit's intentional-discrimination theory, the factual allegations of Respondents' complaint are insufficient to state a claim for intentional racial, religious, or national-origin discrimination.[4]

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[4] The Second Circuit's intentional-discrimination inference is further undercut by the fact that a significant majority of Arab/Muslim males on the FBI List were incarcerated at the Passaic County Jail or other non-federal facilities and thus were not subjected to the harsh conditions experienced by those assigned to the MDC. Pet. App. 147a-148a. It is not plausible to suggest that the DOJ Petitioners intended to discriminate against Respondents *because of* their race, religion, or national origin when a large percentage of similarly situated Arab/Muslim detainees were not subjected to similarly harsh conditions.

The complaint's factual allegations with respect to the MDC Petitioners are similarly deficient. In upholding the discrimination claim against the MDC Petitioners, the Second Circuit pointed to allegations that they eventually learned that the FBI was designating Arab/Muslim men as "of interest" and "of high interest" without any evidence that they had ties to terrorism. But even if they thus became aware that the detention policy was having a disparate impact on Arab/Muslim men, one cannot plausible infer from those allegations that they continued to hold such men in ADMAX SHU *because* they intended to discriminate against Arab/Muslim men. Rather, by far the most plausible inference is that they did so because they were required to do so under BOP Policy.[5]

Review of the Rule 8 issue is also warranted because the Second Circuit's interpretation of *Iqbal* is inconsistent with that of other circuits. *See, e.g., Moss v. U.S. Secret Service*, 572 F.3d 962, 970-72 (9th Cir. 2009) (*Iqbal* required dismissal of First Amendment discrimination claim where plaintiffs' allegations demonstrated only that the defendants were aware of

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[5] The Second Circuit's rationale could have serious negative impacts on national security. The implication of the appeals court's decision is that once the MDC Petitioners became convinced that there was little credible evidence of terrorist ties for some of the unauthorized aliens designated as "of interest" or "of high interest" by the FBI, they should have deliberately disobeyed BOP Policy and removed those individuals from the ADMAX SHU. *Amici* respectfully submit that it is wholly inappropriate for federal courts to interfere with the Executive Branch chain of command in that manner, interference that could potentially disrupt the ability of senior officials to direct subordinates in responding to national-security threats.

disparate impact); *Guirguis v. Movers Specialty Services, Inc.*, 346 Fed. Appx. 774 (3d Cir. 2009) (dismissal of complaint alleging national-origin discrimination in employment affirmed on the basis of *Iqbal*, where plaintiff alleged that defendant fired him because of his Egyptian nationality but included no factual allegations that supported an inference of intentional discrimination).

III. THE SECOND CIRCUIT'S DECISION TO RECOGNIZE A JUDICIALLY INFERRED DAMAGES REMEDY FOR RESPONDENTS' CONSTITUTIONAL CLAIMS CONFLICTS WITH DECISIONS OF THIS COURT

As Petitioners have ably demonstrated, the federal appeals courts are sharply divided on the issue of whether federal courts, without awaiting express authority from Congress, should infer a damages remedy for Respondents' constitutional claims. *Amici* concur that the Court should grant review on this issue as well, in order to resolve the conflict.

Amici write separately to note that the Second Circuit's unprecedented recognition of a *Bivens* action to challenge Executive Branch national security policy also conflicts with decisions of this Court. The Court's authority to recognize a new constitutional tort is anchored in its general jurisdiction to decide all cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. However, the Court has exercised that authority only sparingly. *Bivens* (decided in 1971) marked the first time that the Court did so. It has done so on only two other occasions (most recently in 1980), and since then has "consistently

refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001).

The reluctance to extend *Bivens* is grounded in separation-of-powers concerns. Deciding whether to extend *Bivens* focuses not on "the merits of the particular remedy sought, but on who should decide whether such a remedy should be provided." *Bush v. Lucas*, 462 U.S. 367, 380 (1983). The answer is generally Congress, because "Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act in the public's behalf." *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007).

The Court's *Bivens* case law suggests that it is particularly appropriate to permit Congress, rather than the courts, to decide whether to recognize a right of action for Respondents' constitutional claims. Those claims implicate important national security issues. As the Court has repeatedly recognized, "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). Congress may ultimately determine that a damages remedy would provide an appropriate check against overly harsh treatment of unauthorized aliens who are properly subject to detention and are being investigated for possible connection to terrorism. But Congress has not done so to date, despite its adoption of numerous post-9/11 statutes addressing detention policy. Review is warranted to determine whether the Second Circuit overstepped judicial bounds by recognizing Respondents' right to assert their

constitutional claims.

CONCLUSION

The Court should grant the Petitions.

Respectfully submitted,

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June 8, 2016